Tony Silva Painting Co., Inc. *and* Painters and Tapers Local 272, International Brotherhood of Painters and Allied Trades, AFL–CIO. Cases 32–CA–15102

January 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On June 27, 1996, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief and limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Tony Silva Painting Co., Inc., San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because they engage in activities on behalf of the Union or other protected concerted activities, and in order to discourage other employees from engaging in such activities.

(b) Interrogating employees about the union activities of union officials.

(c) Threatening an employee with job loss if he engaged in union activities.

(d) Interrogating an employee about union tactics or strategy with respect to strike plans.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Francis Gonzalez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Francis Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Francis Gonzalez, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Jose, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of

[1] In finding that the Respondent, inter alia, violated Sec. 8(a)(1) of the Act by interrogating employee Francis Gonzalez on two occasions, the judge referred to Gonzalez as an open union supporter. In his limited cross-exceptions, the General Counsel contends that although the judge was correct in finding that the Respondent unlawfully interrogated Gonzalez, the evidence does not support the judge's open union supporter finding. We find it unnecessary to decide whether Gonzalez was an open union supporter because the Respondent's interrogations of Gonzalez were coercive and unlawful whether or not Gonzalez was an open union supporter.

The first interrogation was unlawful because it appeared to be a hostile inquiry into what was causing Union Representative Papa to come to the jobsite to enforce the wage payment provisions of the collective-bargaining agreement, an implication being that perhaps Gonzalez was responsible for these visits. The inquiry was clearly coercive in light of the threat implicit in Silva's accompanying statement that if Gonzalez did not give a "hard time," there would be plenty of work for him at the jobsite. The second interrogation—questioning Gonzalez about whether the Union was going to call a strike—was coercive because Silva was trying to put Gonzalez into the unsolicited role of informant on union plans, and again implicitly attempting to induce an admission of the close connection with Papa. In this conversation Silva again voiced his anger at Papa, whom he depicted as coming out the job to "screw up" his company.

In agreeing with the judge's finding that the Respodent's reasons for discharging Gonzalez were pretextual, we do not rely on the judge' statement in fn. 4 of his decision that the Respondent's termination letter alleging that Gonzalez conspired with Papa to engage in eavesdropping in violation of California law was "nonsense."

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate or otherwise discriminate against you because of your support for Painters and Tapers Local 272, International Brotherhood of Painters and Allied Trades, AFL–CIO, or any other union, or in order to discourage you or any other employees from engaging in such conduct or other protected concerted activities.

WE WILL NOT ask you to report on the union activities of union officials.

WE WILL NOT threaten you with job loss for engaging in union or other protected concerted activities.

WE WILL NOT ask you about union tactics or strategy with respect to strike plans.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Francis Gonzalez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Francis Gonzalez whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Francis Gonzalez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

TONY SILVA PAINTING CO., INC.

Gary Connaughton, Esq., for the General Counsel.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Oakland, California, on May 23, 1996,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board (the Board) for Region 32 on January 26, 1996, and which is based on a charge filed by Painters and Tapers Local 272, International Brotherhood of Painters and Allied Trades, AFL–CIO (the Charging Party or the Union) on November 24. The complaint alleges that Tony Silva Painting, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

(1) Whether Respondent, acting through its owner, Silva, discharged its employee Francis Gonzalez, because Gonzalez joined or assisted the Union or engaged in other protected concerted activities for the purpose of collecting bargaining or other mutual aid or protection.

(2) Whether Respondent, acting through Silva, committed one or more of the following acts, thereby interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

(a) Interrogating employees about why the Union was coming to the jobsite and "busting his balls."

(b) Threatening employees that there was plenty of work so long as they did not cause him any trouble.

(c) Asking employees what the Union was doing and whether it was going to strike Respondent.

I. JURISDICTION AND LABOR STATUS OF THE UNION

Respondent, a California corporation, performs business as an industrial painter with an office and place of business located in San Jose, California. Respondent has admitted in its answer (G.C. Exh. 1(i)) that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find.

Although Respondent denied the labor status of the Union in its answer, I find based on the testimony of General Counsel's witness John A. Papa, business representative of the Union, that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus, Papa testified that employees participate in the organization by voting both to ratify labor agreements and to elect officers and by filing grievances. The Union also negotiates labor contracts with employers and these agreements concern not only terms and

[1] All dates herein refer to 1995 unless otherwise indicated.

conditions of employment, but provide for the filing of grievances with respect to the terms and conditions of the labor agreements and the Union deals with the employer in attempting to resolve particular grievances.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Matters*[2]

The answer (G.C. Exh. 1(i)) was filed by Attorney Roger M. Mason, who did not participate in the hearing. Instead, on May 22, 1996, Mason called the General Counsel to say that neither he nor his client would be appearing at the hearing and that Respondent was defaulting. This information was conveyed to the General Counsel after the Region declined to postpone the hearing pending settlement of the case on the grounds that because Respondent had filed for bankruptcy some time before, the Region desired to reduce the backpay amount to a definite figure before agreeing to postpone the hearing. The exact status of Respondent's Chapter 11 Bankruptcy proceeding was unknown to the General Counsel.

I find that Respondent knowingly and intentionally waived his right to be present and to participate in the hearing. I also find that the Board is not bound by the automatic stay provision of the Bankruptcy Code and that there was no valid reason to postpone the case, which had been postponed at least one time before.

B. *The Facts*

The General Counsel called two witnesses, alleged discriminatee, Francis Gonzalez, and the Union's business representative, Papa. Gonzalez, a journeyman painter and member of the Union since 1981, was referred by the Union on August 11, to work for Respondent at a job at the Lakeview School in Watsonville, California. The referral was pursuant to a contract between Respondent and the Union, a contract which expired on or about September 18.[3]

From the time Gonzalez started to work for Respondent, he experienced repeated problems with receiving his weekly paychecks on time. Almost every week his paycheck which was supposed to be paid on Thursday was delayed. Gonzalez repeatedly complained about the problem to his business representative, Papa, who, on receiving the call, would usually go to the jobsite to resolve the problem. Eventually Gonzalez always received his pay, but the lack of certainty with respect to delivery played havoc with his creditors. Gonzalez also had occasional problems with the amount of his pay and the correct number of hours.

On September 8, Gonzalez had in his possession three paychecks amounting to $1200, when a new problem developed. This time the paychecks bounced. Again Gonzalez complained to Papa and also discussed the problem with some or all of the other four Respondent employees on the jobsite. On September 11, Respondent replaced the bad checks with good ones, but Gonzalez nevertheless reported Respondent to the State Department of Labor for paying wages with nonsufficient funds checks.

On November 6, a Monday, Silva delivered to employees paychecks that had been due the prior Thursday. After Silva left, two employees, brothers named Villalobos, told Gonzalez that their checks did not reflect the correct prevailing wages nor the correct number of hours worked for the week in question. To assist these employees to resolve their paycheck discrepancies, Gonzalez called Papa to the jobsite and on his arrival, all four went to discuss the problem with the general contractor who was on the jobsite. Then Gonzalez and Papa decided to call Silva the following day at 7 a.m. to discuss the problem. Papa intended to listen to the discussion on an extension and when Gonzalez had finished, Papa intended to join the conversation as a mediator apparently suggesting that Silva's problems with his payroll would be alleviated or resolved, if and when he signed on again as a union contractor. This plan did not turn out as expected.

On November 7, at 7 a.m., Gonzalez reached Silva at his office and related the problems of the Villalobos brothers. Silva advised Gonzalez to mind his own business and return to work. However, Gonzalez persisted, in part because the Villalobos brothers had indicated their belief that Gonzalez was responsible along with Silva for the short paychecks based on Gonzalez' job of keeping daily attendance. Gonzalez insisted that Silva come to the jobsite as the only way the problem could be corrected. Then Gonzalez added that employees needed to be organized back into the Union so problems with paychecks would not continue to happen. When Gonzalez finished, Silva said that for him, the job was over and that Silva would be there shortly with Gonzalez' final paycheck. Before Papa had a chance to speak or even to make Silva aware that Papa was listening on an extension, Silva hung up.

About 3 hours' later, Silva's job superintendent, Manual Costa, delivered Gonzalez' final paycheck to the jobsite. Gonzalez insisted on being told whether he had been terminated or laid off, and an explanation for whichever it was. Gonzalez added that Silva had previously assured him there was plenty of work to be done not only on the school jobsite, but at other jobsites as well where Silva had contracts to do work.

At first Costa pleaded ignorance claiming he was only doing what Silva had instructed him to do. But when Gonzalez insisted that Costa call Silva to find out information on why Gonzalez was being separated from the job, Costa finally agreed. On returning from talking to Silva, Costa told Gonzalez that he was being laid off for lack of work.

After Gonzalez left the jobsite and successfully filed for unemployment compensation, Papa had occasion to return to the jobsite from time to time as he represented a unit of drywall tapers working there. Papa observed employees of Respondent performing work on the site through January 1996. At some point in early 1996, Respondent was replaced as the paint contractor at the Lakeview school site. Thereafter Papa observed the new paint contractor performing work on the site through May 1996.

[2] The General Counsel waived his right to file a brief in this case.

[3] Respondent had been a union contractor for a period of 2 years in the early 1990s, then went nonunion for 2 years, and then in April he joined the master employers contract until it expired on September 18. With the permission of the Union, Gonzalez remained on the job after expiration.

C. *Analysis and Conclusions*

1. Termination of Gonzalez

The facts show first that Gonzalez was terminated from his job and not laid off for lack of work which I find to be a false and pretextual reason.[4] Prior to his discharge, Gonzalez was engaged in two kinds of concerted protected activities. First he was attempting to assist other employees to resolve discrepancies in their pay and hours much as he had resolved his own wage discrepancies. Gonzalez' activities in this regard were concerted and protected. *Liberty National Products*, 314 NLRB 630, 637 (1994). Next, based on his comments over the phone to Silva on November 7, Gonzalez was also attempting to assist the Union in bringing Respondent back to the fold as a union contractor. An employee acting alone to form, join, or assist a labor organization is protected by Section 7 of the Act. *Manno Electric*, 321 NLRB 278 (1996).

The discharge of Gonzalez must be analyzed under existing Board law as found in the recent decision of *Schaff, Inc.*, 321 NLRB 202 (1996). The administrative law judge recited applicable law (id. at 210):

> In evaluating allegations of unlawful termination, the ultimate "determination which the Board must make is one of fact—what was the *actual motive* of the discharge?" *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). Thus, "the pivotal factor is motive" (citation omitted), *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15, 20 (1st Cir. 1966), and "the employer's motive becomes the focal point." *NLRB v. Oberle-Jodre Co.*, 777 F.2d 1119, 1121 (6th Cir. 1985).
>
> Analytically, motivation is evaluated within the framework enumerated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Based on the above precedents, I find that in discharging Gonzalez, Respondent, acting through Silva its owner, violated Section 8(a)(3) and (1) of the Act because Gonzalez was terminated for engaging in concerted protected activities and I find that Silva was aware of Gonzalez' activities. In support of this finding, I note the timing and abrupt nature of the discharge, the false, and pretextual reason offered by Silva through Job Superintendent Costa and the failure of Silva to appear and present evidence to rebut the General Counsel's obvious prima facie case. *R. J. Liberto, Inc.*, 235 NLRB 1450, 1454–1455 (1978).

2. Silva's statements to Gonzalez

The complaint alleges that Silva made certain statements to Gonzalez while the latter was an employee under the Act. That the statements were made as alleged is undisputed. These statements are not evaluated by the motive or intent behind the statements, but rather are evaluated by determining whether the remarks in question could reasonably have a tendency to interfere with the free exercise of employee rights under the Act. *M. K. Railway Corp.*, 319 NLRB 337 (1995). The allegations must be considered in the context of this case. On or about September 18, Respondent ceased to be a union contractor. With the statements in question to Gonzalez, Silva appeared to be laying the groundwork for termination of his relationship with the Union. I turn now to consider the statements.

(a) On August 24, Gonzalez met Silva for the first time and the latter asked Gonzalez why Papa was coming to the jobsite everyday and "breaking his balls." This question to Gonzalez appears to be an effort on the part of Silva to learn about the union activities of Papa. I find that an employer's interrogation of an employee about the union activities of others violates the Act. *Revere Armored, Inc.*, 310 NLRB 351, 352 (1993).

(b) As part of the same conversation referenced above, Silva told Gonzalez that if Gonzalez did not give him a hard time, there would be plenty of work for him on the jobsite.

I find that this statement, in the context of this case, constitutes a threat of job loss if Gonzalez gave Silva, a hard time, i.e., if Gonzalez were to engage in union activities like Papa coming on the jobsite and attempting to resolve pay discrepancies. See *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3, 452 (1992).

(c) On or about September 7, Silva again came to the jobsite and asked Gonzalez about an alleged approaching union strike . This was an apparent reference to a letter which Gonzalez had received with his paycheck the day before, which stated there was possibly going to be a union strike and that Respondent might be dropping out of the union contract. (This document was not offered into evidence.) In answer to Silva's question, Gonzalez stated he had no information about a union strike except to say he was not aware of one and for additional information, Gonzalez referred Silva to Papa. As part of the conversation Silva added that he hated Papa because all Papa was trying to do was come out to get the job and screw up his Company.

In analyzing this allegation, I begin with the notion that Gonzalez was an open union supporter, not only having been referred through the Union's hiring hall, but also being a close associate of Papa's at the jobsite. In *Liberty Natural Products*, supra, 314 NLRB at 640, the administrative law judge cited applicable Board law in *Kellwood Co.*, 299 NLRB 1026 (1990).

> The Board, in *Rossmore House*,[6] held that an interrogation of an open and active union supporter violates Section 8(a)(1) when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employee's rights guaranteed by the Act. The Board also outlined factors that may be considered in applying this test: the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Subsequently, in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board held that the analysis set forth in *Rossmore House* applied to all interrogations, not only to those involving open and active union supporters, and that whether the employee involved was an open and active

[4] On December 15, Silva wrote Gonzalez a letter purporting to change Gonzalez' layoff to a termination because Gonzalez supposedly conspired with Papa to have the latter eavesdrop on Silva on November 7. Silva also threatened Gonzalez with a lawsuit to collect a civil penalty for eavesdropping. (G.C. Exh. 2.) This letter is nonsense and does not affect my decision in any way.

union supporter was a relevant factor to be considered in evaluating the total context of the interrogation.

[6] 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

See also *Crown Cork & Seal Co.*, supra, 308 NLRB at 449. I find here, as before, that the interrogation was coercive since it attempted to uncover union activities, strategy, or plans outside of official channels. Moreover, when coupled with the disparagement of Union Official Papa to Gonzalez[5] it is clear to me that not only was Silva seeking information to which he was not entitled, Silva was also attempting to splinter Gonzalez' solidarity with Papa. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Tony Silva Painting Co. Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Painters and Tapers Local 272, International Brotherhood of Painters and Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating its employee, Francis Gonzalez, on November 7, because of his union activities or other concerted protected activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and Section 2(6) of the Act.

[5] In *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), the Board stated that: "Words of disparagement alone concerning a Union or its official are insufficient for finding a violation of Section 8(a)(1)." Here, there was unlawful interrogation coupled with disparagement, a combination more than adequate to support the violation.

4. By interrogating an employee to report on the union activities of a union official, by threatening an employee with job loss if he engaged in union activities, and by interrogating an employee about union tactics or strategy with respect to strike plans, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that it unlawfully terminated Francis Gonzalez, Respondent shall be required, within 14 days of this Order,[6] to offer him full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and shall make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Gonzalez in writing that this has been done and the discharge will not be used against him in any way.

[Recommended Order omitted from publication.]

[6] See *Indian Hills Care Center*, 321 NLRB 144 (1996), where the Board set forth specific time deadlines for Respondent to comply with the specific remedial provisions of its orders.